ERROR OF LAW.[1]

I. The Juristic Act—How Affected.

Every juristic act essentially depends upon an expression of the will. It is in the meeting of the minds, unless the law implies a fictitious promise, that the obligation of a valid contract finds its force. That which affects the completeness and reality of consent, which prevents the minds from coming together in true and common understanding, tends to modify or destroy the legal effect and impeach the transaction. In the classification of conditions which may produce such legal consequences, ignorance, the absence of information, and error, the wrong belief, used synonymously, head the list. The question of error, considered in its simple subdivisions, one of which concerns some essential quality of the subject-matter or agreement, *i. e.*, *"error in substantia"* and the other, its very opposite, in which each is thinking of a different subject-matter, *i. e.*, *"error in corpore,"* is not the easiest proposition in the law; but the complications and difficulties which have arisen in the English jurisprudence in particular, and which in a lesser degree have been experienced in France and Germany through the adoption of the principle of the Roman law, familiar to all as the maxim, *"Ignorantia juris non excusat,"* have been endless, costly and provocative of much injustice.

This maxim may be likened to the genie of the Arabic tale who, on being released from long captivity in his brazen capsule, arose in a cloud of smoke to obscure the sun, cause darkness and

[1] In the discussion of the respective rights of parties to a contract entered into under a mistaken apprehension as to its legal effect, under the English, French and German law, the author has confined himself to "error of law" rather than to "error of fact." His investigations have been directed toward the depth of the subject rather than toward breadth and superficiality. The question of error of law most frequently arises in actions for the recovery of money, though not infrequently for setting aside deeds and wills or determining rights under them. As the subject, considered in the light of the law of England, has been greatly confused and misunderstood because of the various rules of pleading, relief having been given, or asked for in "assumpsit," "money had and received" and by bill in equity to redeem or refund, no attempt has been made to indicate the proper forum in which to seek a remedy, or form of action that would prove most efficacious in any particular case. Whether a contract is voidable, or void on account of such error in France and Germany is to be determined by the Civil Code obtaining in each country. In reference to the law of England, where precedents have such tremendous importance, after an analysis of the cases it is deemed sufficient to point out a rule, broad and equitable, which in the author's humble opinion is supported by a preponderance of authority.

confusion below and terrify his liberator; because in its translation and application it has thrown a weird spell upon the law of Christendom, involved its interpretators in dissentious arguments, and at times has enveloped bench and bar in an impenetrable mantle of perplexity and doubt.

Obviously, for all public purposes, citizens must be presumed to know the law. Their ignorance of it is not acceptable as an excuse; if it were, the administration of justice would be impossible. In matters of private law, however, touching the civil rights of citizens, as distinguished from the criminal law, the rigor of the rule works hardship and injustice. It imposes upon the citizen the duty of knowing the law in its entirety. And yet there is another maxim which says that the law requires nothing impossible.[2]

Lord Mansfield, when it was argued before him that all laws of the country are presumed clear, evident and certain, answered:

"As to the certainty of the law it would be very hard upon the profession if the law was so certain that everybody knew it. The misfortune is that it is so uncertain that it costs much money to know what it is even to the last resort." [3]

It is the purpose of this inquiry, therefore, to discover whether under any, and if so, what circumstances the victim may be assisted and relieved of the consequences of his error, or be made to suffer the penalty for his stupidity.

II. ORIGIN OF THE MAXIM "IGNORANTIA JURIS NON EXCUSAT."

The recovery of a payment of money, made through ignorance, or mistake of law, has been the subject of long and spirited controversy among the commentators, ancient and modern, on the Roman law. The affirmative side has included such illustrious and profound scholars as Vinnius, D'Aguesseau, Ulric Huber and Muhlenbruch, who maintained with much argument that restitution was to be obtained in all cases of error, whether it be an error of fact, or an error of law.[4] Other eminent jurists, notably Cujas, Donellus and Voet, took the opposite view of the proposition and argued with force and skill that no action lies to recover money paid through error of law. Savigny, whose eminence was no less than the others, expressed a very similar view, declaring that money which has been paid by reason of error of law cannot be recovered by the *condictio indebiti* without

[2] Coke, Litt. 231, b. [3] Jones *v.* Randall (1774) Cowp. 37.
[4] MacKenzie's Roman Law (5th Ed.) 256.

proof that such ignorance is excusable and not the result of gross negligence.[5]

The negative of the proposition is based upon the law:

"Where a person, ignorant of the law, pays money which is not due, the right of repetition ceases, for repetition is allowed only in cases where what is not due is paid in consequence of an error of fact."[6]

The affirmative relies upon the text of Papinian:

"An ignorance of law does not avail those who are desirous of acquiring and does not injure those who merely seek their own. An error in law does not subject any person to the injury of losing his property. Therefore, wherever the question relates to avoiding or repairing a loss, an ignorance of the law does not induce any prejudice."[7]

The first cited text is declared by its advocates to be of universal application and not confined to those cases where, although there might have been no legal, yet there was a moral or natural obligation to make the payment, and therefore the person to whom it was made has a right *"in foro conscientiæ"* to retain it. In attempting to reconcile the text of Papinian they insist that the cases in which error of law does not prejudice, are those in which the party is contending *"de amittenda re,"* and that if he has parted with his property, even through ignorance of the law, it ceases to be his, and that in seeking to recover it he is not *"petens suum"* or *"in damnis amittendæ rei suæ,"* but that he is *"volens adquirere"* for its recovery is *"in compendiis."*[8]

To this Vinnius justly observes that it cannot be said a man is deriving gain from his error in law, when he recovers back his own property. He and Chancellor D'Aguesseau insist that the text of the Code is to be understood as applying only to those cases in which the payment has been made under a natural or moral obligation, and where, therefore, there is nothing unconscientious in retaining the payment. In other words, they contend that *condictio indebiti* can be excluded only on an equitable plea, because it is itself founded on equity; and that in the whole title of the Digest treating of *condictio indebiti*[9] restitution is never denied to an error of law, or confined solely to an error of fact, but is constantly ascribed to error, simply, whether the payment was made

[5] System V. 3; Appendix 8, § 35. [6] Code Justinian 1, 18; 1, 10.
[7] Digest 22, 6, 1, 7, 8; Salkowski's Roman Private Law, p. 94.
[8] Vinnius in Evans' Pothier, Appendix, 443. [9] Digest 12, 6.

on account of what never was due, or of some claim unenforceable because of a perpetual exception; and that some passages in the Code, in which restitution appears to be denied to an error of law, occur in rescripts which could be intended to apply only to those cases where a natural obligation existed, so as to afford good ground of retention in equity.[10]

They show conclusively that in those cases where it is admitted that a recovery may take place, the ignorance under which the payment was made, is of law and not of fact; and in those cases where recovery is not allowed the party is debarred from relief because of a subsisting natural or moral obligation rather than an ignorance of law.

If no natural obligation subsists, recovery should be allowed. In part the views of Vinnius are expressed as follows:

"I subscribe to the opinion of the old interpreters, that repetition should be allowed even of what is paid by error of law, provided there is not any natural obligation. In the first place, I am influenced by the consideration, that the *condictio indebiti* is introduced *ex æquo et bono* and therefore can only be excluded by exceptions founded upon equity on the opposite side. * * * I am also influenced by the consideration that in the whole title of the Pandects, *de condictio indebiti,* although it is rather diffuse, the right of repetition is never applied solely to error of fact, or denied to error of law, but is referred generally to error, whether what is paid was not due in any sense, or whether the claim of it could be repelled by a perpetual exception; so that it is to be understood that the right of repetition is not prevented by the nature of the error, but by the knowledge of the person making the payment and by that only, as is clearly proved as well by the laws, as by the reason which is assigned, why a person cannot reclaim what he has paid knowing it not to be due from him, viz., that he is presumed to have given it; which cannot be said of a person who thought himself under the obligation and necessity of paying. * * * For the mere circumstance of my having mistaken the law, does not alone give you a just reason for retaining what was not in any manner due to you; and in this case it is better to favor the right of repetition than the acquisition of an adventitious gain." [11]

The argument of D'Aguesseau is unanswerable. He says: [12]

"Error of law ought not to give any person a title of acquisition: the reason is evident, and Cujas comprises it in a word in his

[10] Vinnius Inst.; Huber Inst. Lib. 3, t. 28.

[11] Chap. XLVII of Bk. I of the Select Questions of Vinnius, reprinted in the Appendix of Evans' Pothier.

[12] Dissertation on Mistakes of Law, reprinted in the Appendix of Evans' Pothier.

Commentary on Law. Otherwise, an ignorance of the law would be an advantage to the person making the mistake. Error would have more privileges than knowledge, and ignorance would be recompensed, whilst science would not.

"Hence those solemn definitions of the law; ignorance of the law does not profit those who are desirous of acquiring an advantage.[13]

"An error of law cannot be taken advantage of even by women.[14] Ignorance of the law is of no advantage in case of usucaption.[15]

"But this maxim seems only to have been contemplated in one point of view. Most of those who have treated of it, have only considered it in regard to the person who falls into an error of law, to whom it is certain that his ignorance can never be of any advantage; but the rule does not appear less certain, with respect to those with whom another by mere error of law may contract an engagement. I mean it is scarcely less evident, that an error of law in one party is not a sufficient cause to afford title and means of acquisition to another. I suppose the error of law to be the only cause and the single foundation of the contract or obligation, in a word of the act which is passed, and proceeding upon this supposition, I say, that an error cannot profit the person who obliges himself, neither can it give an advantage to the person to whom he is obliged.

"It would be false, that equity does not allow one man to enrich himself at the expense of another; that what belongs to me cannot be acquired by another without my consent or fault; unless it can be said that one who is under an error gives a real consent, or that the law regards a legal mistake as a fault which it punishes by the loss of the property that was the subject and occasion of it. But the first cannot be maintained, and how is it possible to prove the second? Even supposing that a person who mistook the law deserved to lose his property, how could that prove that the other deserved to gain it? And that for this single reason, that the person who erred was not acquainted with his right. In a word, who will maintain that for this error the one deserved to be stripped of the property which belonged to him and the other to be invested with that which did not?

"This is not all; it must be further maintained that an obligation without any cause, or founded upon a cause which was false, unjust and illegitimate, could be valid; that that which is null could produce effects, that the law could not establish that favorable remedy to which it gives the name '*condictio sine causa*,' or '*condictio indebiti*,' and that thus converting all obligations without cause into forced donations, it regarded all those who contracted from error in point of law as real donors.

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[13] Digest 22, 6, 7. [14] Cod. L. 8 ff. [15] Cod. L. 4 ff.

"To avoid all these inconveniences, nothing is more simple than to give the rule of law all the extent of which it is capable. *'Error juris in compendiis non prodest;'* then it is of no advantage to either party, *"neque reo neque stipulatori prodest,'* to the one because it is not just that his fault should be of any service to him, and that he should derive an advantage from his own error; to the other, because there is not a single law in the whole system of jurisprudence which establishes that an error of another shall of itself, and without any other cause, be a legitimate title and a just means of acquisition.

"All these principles being allowed, it appears easy to decide what are the consequences which ought to result from an error of law. For, 1st, the question relates either to acquiring or losing. If it relates to acquiring, an error of law is neither an excuse nor a title, except to minors and others, who are assisted even in respect to gain. * * *

"And in this principally consists the difference between error of law and error of fact. In error of fact (says Cujas) there is not any distinction between gain and loss; in error of law there is.

"When the question relates to keeping, or to avoiding the loss of what we already have, the discordant opinions of the interpreters can scarcely * * * be reconciled; and lest you should accuse the modern interpreters alone, you may consult the Basilican interpreters, among whom there is a very great difference upon this subject. * * *

"But who shall wonder at so great a discord amongst the interpreters of the law? For the laws themselves appear to be discordant with each other. For Dioclesian and Maximian state in the law, that where a person ignorant of the law, pays money which is not due, the right of repetition ceases, for repetition is only allowed in cases where what is not due is paid in consequence of an error in fact. Here the various ways in which a thing is not due are not distinguished; but it appears clear that whatever is paid, through an error of law, without being due, cannot be reclaimed, and that there is no right of repetition, except for what is paid in consequence of an error in fact.

"But the very title of the 'ff. & Cod. *de condictione sine causa*' shews the contrary; for it is an undoubted principle of law, that what is promised either without a cause, or for an unjust cause, may be recovered back."

III. The Principle Obtaining in France.

France, from time immemorial, has been governed, in part at least, by the Roman law. Even in the customary provinces it was held to supply the most likely index to the meaning of a doubtful or imperfectly-defined custom.[16] Thus its influence can be traced through the various codifications, partial, local or general, from

[16] Amos, Roman Civil Law, 434.

the charter of the Commune of Beauvais, granted by Louis the Young in A. D. 1114; the general Ordonnance published by Charles VII, after expelling the English, in 1453; the civil and commercial legislation during the reigns of Louis XIV, Louis XV and Louis XVI; and down to that great code which had its inception in the decrees of the National Assembly of 1791, and became associated with the name of Napoleon.

The framers of the French Code, although they copied, almost verbatim, from the works of Justinian and the commentaries of Pothier much of its wording and arrangement, mindful of the long and spirited controversy into which the various interpreters had plunged, accepted with wise foresight the conclusions of Vinnius and D'Aguesseau.[17] Though they loved and admired Pothier and accepted his teachings in other branches of the law, as the Germans had idolized and followed Savigny, yet, since neither he nor Voet had discussed or answered the lucid and powerful arguments on the other side of the question,[18] they adopted the following general rule, which has exercised the greatest influence upon other systems founded upon the civil law: [19]

"When a person, who, by error, believing himself to be the debtor, has discharged a debt, he has a right of repetition against the creditor. This right ceases, however, if the creditor, in consequence of the payment, has destroyed his written proof of debt, recourse in that case being reserved to the person who has paid against the true debtor."

Restitution, under this article, may be demanded in all cases without distinction, whether the payment was made because of an error of fact or an error of law. The decisions of the courts have been in conformity with the opinions of Vinnius and D'Aguesseau.[20]

Thus: Where a person of full age, on whom alone, by the coutume, a succession had devolved, in ignorance of this coutume, had recognized his three nephews as his coheirs for many years in the most formal public and private acts, it was held that he was entitled to recover that which, through his ignorance, he had allowed them to receive.[21]

[17] Touillier, Le Droit Civil (5th Ed.) 79; Zacharia, Droit Civil (6th Ed.) V. 2, § 442.

[18] Burge's Comm. V. 3, p. 729. [19] Code Napoleon, Art. 1377.

[20] Pailliet, Manuel de Troit Francaise, 4th ed. 252; 8th ed. 358; Laurent's Principes de Droit Civil, V. XX, n. 354; Baudry-Lacant. & Barde's Droit Civil, V. 3, pp. 1067-8.

[21] Augeard, T. 1,134; Tuillier, Le Droit Civil (5th Ed.), L. 3, t. 3, ch. 2, n. 66.

Domat, that great scholar of whose talents it may be said "age cannot wither nor custom stale"; whose period of usefulness antedated by more than a hundred years the Code Napoleon, and whose work was particularly adapted to the French jurisprudence of the time in which it was published,[22] is still cited at the present time, because more practical and less philosophical than more modern writers on the Roman law, as an eminent authority upon principles embodied in the code of France.[23] His views, if it can be said that they were secondary to those of Vinnius and D'Aguesseau in moulding the opinions of the law-makers of France, were wonderfully lucid and sound. He outlined a series of rules illustrating the different effects of error of law, in covenants, in part as follows: [24]

"If the ignorance or error in law be such that it is the only cause of a covenant in which one obliges himself to a thing which he was not bound to otherwise, and there be no other cause on which the said obligation can be founded; the cause proving to be false the obligation will be null. Thus, for example, if he who purchases a fief situated in a custom where no fine is payable for the purchase, goes to the lord of the manor and compounds with him for the fine which he supposed to be due; this covenant, which has no other foundation besides this error alone, will not oblige the purchaser to pay the fine which was not due.

"The foregoing rule not only takes place in preserving the person who errs from suffering any loss, as in the case there explained; but it takes place likewise to hinder him from being deprived of a right which he did not know belonged to him. Thus, for instance, if the nephew of an absent person takes care of his affairs, and the absent person happening to die, the brother of the deceased, as his heir and next of kin, demands of the nephew an account of his intromissions with the effects of the deceased; the nephew gives an account and restores to his uncle all that remained in his hands belonging to the said succession, for want of knowing that he succeeded likewise to the deceased, by the right of representation to his father, who was brother to the deceased; he may afterwards, being informed of his right, demand his part of the succession."

Where ignorance of the law is of no avail, is shown by Domat as follows: [25]

"If by an error or ignorance of the law one has done himself a prejudice, which cannot be repaired without breaking in upon the

[22] A. D. 1694.

[23] Domat, Th. Civil Law (Cushing's Ed.) pp. 497 *et seq.*

[24] Domat, Th. Civil Law (Cushing's Ed.) nos. 1237, 8, 9, 40.

[25] Domat, Th. Civil Law (Cushing's Ed.) n. 1239.

right of another person, this error will make no change or alteration to the prejudice of that other person. Thus, for example, if he who has been born and bred in a country where persons are reputed to be majors at the age of 20 years, treats in another country where the law continues the minority to the age of 25, but whom he knows to be upwards of twenty, and therefore believes him to be major, or if he lends him money, this error will not hinder the said minor from being restored, if there be ground for it. For it is a right which belongs to him by virtue of a law, the effect of which is not changed to his prejudice by that other person's ignorance. And if the money lent has not been profitably laid out, the error of the lendor will not excuse him from bearing the loss. Thus he who had given an estate in land in payment in a transaction hoping to have it back again because of his being wronged in more than half of the real value, could not under this pretext recover this estate, which his adversary had acquired by a title which the law does not allow to be annulled on account of any such damage sustained."

Commenting upon these examples Cushing [26] remarks that ignorance of the disposition of the customs is an ignorance of the law, as much as the ignorance of the ordinances and other laws. For, although the customs he considered as facts, he says:

"Because being only part of the positive law, and different in different places, it is natural that they be not all known, even to the most knowing persons: yet nevertheless they have the force of laws, which have their effect with regard to those that are ignorant of them, as well as those who know them."

Continuing, Domat illustrates the effect when error of law is not the only cause of the covenant, as follows: [27]

"If the error in law has not been the only cause of the covenant, and he who has done himself some prejudice may have had some other motive, the error will not be sufficient to annul the covenant. Thus, for example, if an executor treats with a legatee, and pays him, or obliges himself to pay him his whole legacy, not knowing anything of the right which he had to detain part of it because the testator had bequeathed beyond what he had right to dispose of, either by law or custom, this covenant will not be null. For this executor may have perhaps obliged himself to pay the whole legacies, out of a motive of executing fully and entirely the will of the deceased to whom he succeeds. And it would be the same thing with respect to the heir or executor of a donor, who had executed or ratified a donation, which he did not know to be null for want of being registered."

[26] Domat, Th. Civil Law (Cushing's Ed.) p. 501.
[27] Domat, Th. Civil Law (Cushing's Ed.) n. 1240.

The Code Napoleon, as that eminent jurist and learned commentator, Larombiere,[28] observes, distinguishes no further than the reason itself can distinguish between error of law and error of fact. There is no valid consent if it has been given only through error;[29] but error is not a cause of avoidance of a contract unless it rests upon the very substance of that which is the basis of the contract, or upon the person who is the principal cause of the contract.[30] The courts and the commentators agree, in the interpretation of these articles, that the effect of error of law, like error of fact, is to vitiate consent.[31]

The Papinian principle, which Chancellor D'Aguesseau in his discourse illustrated so clearly, that error of law is no more a means of losing than of acquiring, is the guiding star of the French jurists. Larombiere[32] cites a decision of the Royal Court of Limoges,[33] which "among the numerous monuments of jurisprudence that have consecrated the principle" has made a remarkable application of it. He says:

"Lady Briquet left as natural heirs Mr. Magenest, the father, Lady Tramont and the children Marcoul-Lagorce. She made a will by which she disposed, by name, of certain things, in favor of the Magenest children, reserving the usufruct for their father; of other things in favor of Lady Tramont; and still other objects in favor of the children Marcoul-Lagorce. She qualified them general heirs at law and residuary legatees. In addition to the determinate objects of each disposition there were found others without special assignment. Lady Tramont, taking the quality of heir presumptive, in part, and of residuary legatee, asked partition against the children Marcoul-Lagorce and Magenest, the father. The last named, recognizing the qualities taken by Lady Tramont, and basing his contention upon the incompatibility of her qualities of heir and legatee, asked the refunding of the legacy made to Lady Tramont, offering to give up his legacy, constituting the usufruct. Judgment of the first instance sustained this contention. On appeal the court held otherwise, with much reason, that the division of parts into particular and determinate objects does not prevent the testament from containing the residuary legacy; that Lady Tramont, then, in her capacity of residuary legatee, had a right to a third of the omitted objects; and that she had assumed the double qualities

[28] Theorie & Pratique des Obligations 54.

[29] Code Napoleon, Art. 1109. [30] Code Napoleon, Art. 1110.

[31] Larombiere, Theorie & Pratique des Obligations p. 54; Laurent, Principes de Droit Civil xx, n. 354; Pardessus Comm. (5th ed.) V. 1, 289. Baudry-Lacant & Barde. Droit Civil V. 3, pp. 1067, 8.

[32] Theorie & Pratique des Obligations 55.

[33] Sirey Recuil General des Lois et des Arrets. T. 39, 2, 27, 1837.

of heiress and residuary legatee only through error. In conclusion it admitted her to partition of the objects not included in the testament, excusing her from refunding and excluding the father Magenest.

"The Court of Cassation finally decided that the injured party may demand the rescission of the act containing partition of the community if it has included objects acquired personally since its dissolution in result of the error of law that caused the person to believe that the want of inventory continued the community down to the time of partition."

Ignorance, or error of law, on the other hand, excuses neither an offense nor a delinquency. The law regulating public order, whether it prohibits or commands, is to be obeyed, whether the person is acquainted with its provisions or not. Or, if A suffers B to acquire a right of prescription against him, or if he neglects to ascertain the legal formalities of a contract, his ignorance of the law will not justify him. The maxim "*nemini jus ignorare licet*" is as effective in France as elsewhere, and it is worse for him who has mistaken the law.[34]

There is another side to this question of error of no little importance, which the commentators approach with much reserve. It is the comparison of error of law to error of jurisprudence, or of doctrine. In the sense that it is the habit of judging the same questions in the same manner, and thereby forming precedents, the science either gives to the understanding of the law some certainty and precision, or by its opposition causes doubt and uncertainty. In relation to this kind of error, Larombiere[35] observes:

"When, therefore, the solution of a question raises different systems, if in good faith and ignorant of a contrary opinion, I am the one who counts the least authority in my favor, shall I be able to place myself in the circumstance of an error of law and plead the nullity of the act done in consequence? Let us not forget this principle; it must be certain that the error is the principal cause. Now, the variety and contrariety of opinions themselves cause doubt whether the error was the principal cause. One can believe that with the knowledge of all the contrary systems, of their reasons and their partisans, I nevertheless would have done what I did, instead of proceeding in the adventure of a suit, with the more or less uncertain choice of justice.

"For example, in ignorance of the decisions of the Supreme Court and the opinions of learned jurists who decide that the

[34] Larombiere, Theorie & Pratique des Obligations 56.

[35] Theorie & Pratique des Obligations 60, 61.

woman, in default of registry regularly taken, is after the purge fallen from all rank of mortgagee relative to the other creditors who have taken registry, I nevertheless let the woman precede me in an amiable order,[36] notwithstanding the lack of registry on her part and the regularity of mine; I could not be reinstated under the excuse of an error of law, because, after all, I have done only what a mass of decisions and noted authors would have me do, and what, perhaps, I should have done even if I had had the pros and cons under my eyes.

"But we should exaggerate nothing. There are questions, the solution of which, so simple, so evident as they are, raise, nevertheless, an inconceivable contrariety of opinions. The evidence itself is disputed and denied. If in the contest of contrary opinions there exists on one side a mass of imposing authority, in reason, in doctrine, in jurisprudence, and on the other a subdued minority reduced to silence, where the solitary cry is only a vain and ridiculous protestation; if the question is on one of those points, at first controverted, but soon removed from discussion and determined by an accord between opinions and decisions, then it may happen that an error on a point on which doctrine and jurisprudence agree may be considered equivalent to an error of law according to the gravity of the circumstances.

"But it is well understood that to appreciate the error we must go back to the time when it was committed. The science of law has in reality this progress. Such a point establishes itself only in a long time. The systems have come into collision before; and one of them remains master on the field of battle, has arisen alone and triumphant, on the ruins of the other. In the height of the struggle we placed ourselves in good faith, through error, or rather through lack of foresight, on the side of the system which ended, by dying. It would evidently do mischief to invoke the subsequent progress of science, and the recent stability of opinions, to establish that during this time we had committed an error of law, capable to-day of annulling the convention. Who, in reality, can know if consent has been refused in full knowledge of the divers systems then in sight? Of what importance is it if to-day, in the present state of the jurisprudence and the doctrine, error can be a cause for nullity if there is nothing to prove that in former times it has been the determinant cause of the contract? Let it be as it is, the allegation of this error would never have but an indifferent acceptance with the judges. Experience teaches that the merit of jurisprudence consists in its being constant. What changes, what variations! This is always the inconsistency of humanity. No points are to be considered constant save those which, in the consecration of time, are passed to the state of unobjectionable truths, as if they were expressly written in the law."

[36] That act by which the rank of preference of claims, among creditors who have liens over the price which arises out of the sale of an immovable object, is ascertained.

The Civil Code recognizes two exceptions to the general rule and denies relief for error of law in cases of judicial admission, and compromises. A judicial admission is defined as a declaration made in court by the party or his special attorney in fact. It cannot be revoked unless it is proved that it results from an error of fact.[37] It cannot be revoked on the ground of an error of law. And this principle applies not only to judicial admissions but also to extra-judicial admissions, to contracts and to acts intervening under circumstances where it would be impossible to prove that the error of law was the determinant cause.[38]

Compromises cannot be attacked on account of an error of law [39] because, having as their object the termination or prevention of a lawsuit, it is impossible to know whether consent was due to an error of law rather than to a desire to reconcile and to pacify.[40] As Larombiere puts it:

"When we make terms we always have a feeling of doubt and mistrust as to the existence of the law, its meaning, its application. The compromise implies, therefore, a preliminary examination of the law. The appreciation may be erroneous and false; but where will be the irrefutable proof? It can be only in a judicial decision. Now then, we do not conceive that we can recall a similar decision of a compromise which has precisely as its object to prevent it, neither that this compromise can be annulled justly by the act with which it is proposed to replace it. There certainly would be but few compromises which would stand a scrupulous examination of law, for they almost always contain reciprocal concessions, made rather *'ex æquo et bono'* than *'ex summo jure.'* Therefore it is their very nature which warrants against attack under a pretext of error of law."

This exception is not peculiar to the law of France. The same principle is found in Roman legislation,[41] in those codes which are based upon the Roman law,[42] and in the common law of England.[43] It is no ground for recalling the payment made under the compromise that there was no cause for the compromise, and that noth-

[37] Code Napoleon, Art. 1356.

[38] Larombiere, Theorie & Pratique des Obligations § 25, p. 57.

[39] Code Napoleon, Art. 2052.

[40] Larombiere, Theorie & Pratique des Obligations.

[41] Colquhoun, Summ. V. 3, p. 127.

[42] Commentators on the German Code differ in their interpretation of § 779, relating to Vergleich (Compromise); See Von Staudinger, Komm. § 779, and Oertmann, Der Vergleich, § 286.

[43] *Infra*, pp. 510, 511.

ing was owing.[44] The very essence and motive of the compromise is the uncertainty and doubt of the parties as to their respective rights.[45] The doubt may arise either from ignorance as to the existence of any law applicable to the question or as to the manner in which it should be construed or applied. Ignorance of the law, therefore, would not be a ground, in the Civil Law, for recalling a payment made under the transaction.[46]

IV. The Simplicity and Novelty of the German Code in Reference to the Subject of Error.

The German Civil Code, like the French, makes no distinction between error of law and error of fact. But, as will be shown, every error of law does not, of itself, furnish sufficient cause for setting aside the agreement. For a clearer understanding of the half dozen or so articles which confine the subject, so to speak, in a nutshell, a few words should be said of the systems of jurisprudence which were displaced by perhaps the greatest piece of juridical legislation the world has ever known.

For centuries Germany has been, *par excellence*, the country of little, independent territories, each having its separate legal system. At one time the total number of separate states reached two hundred and sixty.[47] At the conclusion of the Franco-Prussian war patriotic sentiment demanded a national system of law to take the place of the five general systems obtaining in various portions of the empire. It has been estimated that out of a population of forty-two and a half millions, in 1896, eighteen millions were governed by the Prussian Code; fourteen millions by the German common law—*i. e.*, the modernized law of Justinian, known generally as the Pandects; seven and a half millions by French law; two and a half millions by Saxon law, and a half million by Danish law.[48] Only two of these systems, however, the French and the Saxon, were exclusive. The others were broken into by local laws and customs. The oldest of these systems was the Prussian, or Frederician Code, popularly known as the *Allgemeines Landrecht*, promulgated shortly after the emperor's death in 1794. That intellectual movement which culminated in the French Revolution, and which advanced the theory of the natural law of Grotius and Puffendorf, influenced Frederick the Great to instruct his Chancellor, Coccoji,

[44] Digest 12, 6, 1, 65. [45] Digest 2, 15, 1, 1.
[46] Burge's Comm. V. 3, pp. 742, 3. [47] Dahn, Jur. Rev. 2, 16.
[48] Schuster, 12 Law Quart. Rev. 26.

to prepare a code on a rational basis, the first draft of which appeared in 1749. His reasons for desiring a better system are characteristically expressed in the introduction, as follows:[49]

"Moreover, some doctors had taken the liberty, on their own authority, to add to the Roman and Canon laws, which are both so uncertain, a German law, which at bottom is only imaginary, since nothing certain is known of its origin, and that most of these German laws, being applicable only to the present constitution, are now also long ago in disuse, so that in place of two laws, Germany had three equally uncertain, introduced by the private authority of some lawyers, who wrote huge volumes on this pretended German law, to which they referred in the decision of suits; and this gave the lawyers a new handle for squeezing the parties to the very marrow of their bones.

"This confusion was only increased in some of our provinces by the introduction of the Saxon law, which was chiefly followed in the forms of proceeding, though it differs in many ways from the common law.

"Furthermore, every province or almost every town quoted particular statutes, unknown mostly to the inhabitants; add to all this the great number of edicts which must necessarily embarrass our subjects. * * *

"In order to remedy so many abuses, we have caused (to be) composed body of law of our dominion on certain and rational principles, in which we have indeed taken the Roman law for a foundation, in so far as its general principles appeared drawn from natural reason * * * (subtleties excluded)."

The Prussian Code, which in its practical rules was merely a reproduction of the Roman law, although in its outward form and some of its general expressions the influence of the natural law could be seen, subject to certain modifications and exceptions, continued in force until the Imperial Code took its place. The principal objection to it was that which Frederick pointed out in a marginal note: "It is a very fat book and statutes must be short and not lengthy."

When, therefore, the first Codifying Commission was appointed in 1874, to prepare a new system which should be national in spirit and supplant all other systems in the empire, it had for its guidance the two old codes of Prussia and France; the Saxon Code of 1863; several carefully considered drafts, and later the Swiss Code of Obligations, which came into use in 1883. In addition there was to be considered the common law of Germany, which was a modernized system of Roman law, not only admin-

[49] Frederician Code (1761) pp. 9, 10.

istered as the law of one-third of the German population, but received as the basis of all of the other codes and taught as the main subject of legal education throughout the empire.[50] The second Commission, which was appointed in 1890 to complete the great work, had for its consideration the published draft code and critical analyses (Motives) of the first Commission, comprising several large volumes, and a mass of criticisms contributed to the magazines and newspapers by men of all schools and parties. The completed Code was adopted by the German Parliament, after a great struggle, in 1896, and became effective January 1, 1900.

The new Code, on the one hand, is severely criticised by Prof. Dahn[51] as being "un-German, unpopular and doctrinaire" in spirit, containing too much Roman law and paying too little regard to native German customs; on the other, it is defended and praised by Dr. Sohm,[52] one of its framers, who says: "The composition of the new Civil Code of Germany is only to a very limited extent Roman in its origin." On the whole, therefore, it probably fairly represents the German people.

As Dr. Sohm observes,[53] "never before has a legal code been characterized by such boldness of plan; never before has the judicial function been invested with such power." To the discretion of the judges has been left the application of the several clauses to special instances; for it has been the rule in German codes to lay down only general principles without enumerating individual instances.[54] The opinion of the court is not only superior to the wording of the contract, but to the letter of the law.

In its treatment of the law of obligations the Civil Code shows boldness and originality. In recognition of the "*votum*" of the Roman law, which, under some circumstances, permitted a vow to create a civil obligation, it makes possible the existence of obligations as a result of the voluntary act of a single party, requiring no acceptance to make them perfect. The term that has been given to such a declaration of will, which does not need to be received to give it binding effect, is "*Nichtempfangsbedurftige Willenserklarung*," and is treated in the second title of the *Burgerliches Gesetzbuch*.[55] In the preparation of this title the Codifying Commission chose rather to follow Vinnius and his school than Cujas,

[50] Schuster, 12 Law Quart. Rev. 27.
[51] Jur. Review, 1890, p. 2; 1904, p. 152.
[52] Forum, Oct. 1899, p. 162. [53] Forum, Oct. 1899, p. 168.
[54] Schuster, Jour. Soc. Comp. Leg., 1899, p. 321. [55] §§ 116 *et seq.*

Donellus and Voet, and some of Savigny's refined distinctions, as, for instance, between real and unreal error, were wholly disregarded as having no practical meaning.[56] In avoiding a distinction between error of fact and error of law, they reflected the philosophical views of such scholars as Dr. Adler and the great Ihering.

Dr. Adler, in an exhaustive article on the subject, treats of the governing principles of error, the foundation of the true principle and its effect, and exposes the weakness of the false doctrine most admirably. A quotation or two will well illustrate the German view. He says, in part:[57]

"Between error of law and error of fact there exists no difference as to excusability. It is a self-evident proposition, admitting of no exception, that a rule of law is operative against a person whether he knows it, or does not know it. In this sense it may be said: 'Error of law does not prevent its application.'

"The reason hereof lies not in the principle that the law requires that we shall know it, however, but in that it does not require it. The application of the law to the ignorant shall be just. But where the law cannot satisfy this requirement it is to the subject, like any other exterior fact, which can bring injury to him who ignores it. That, of course, in not a few cases, produces severity, which again leads to a double consequence. In the first place, in order to counteract the tendencies toward equity, which shake the certainty of the law, this self-evident principle had to be enunciated and repeatedly insisted upon, in result of which it assumed the inexact, traditional form, 'ignorance of the law is injurious,' and in this form, by reason of its antithesis to error of fact, it was twisted into the entirely erroneous meaning in which we have received it from the Roman jurists. This is the true origin of the principle of the inexcusability of error of law. In the second place, however, exceptions were allowed which were intended to soften these severities. Inasmuch as this rule had changed its form at the hands of science and had come, out of a self-evident, not very far-reaching principle, to be palpable paradox of wide-reaching consequences, the foregoing (peculiar doctrine) acquired the further vocation to establish the false principle, formally and apparently, and to make it acceptable by undermining its substance. And it is now time that its rotten masonry should fall before the eye.

"Now, however, the exceptions which only partially corrected the false meaning of the principle, likewise have not spared the kernel. Inasmuch as no difference was made between the true principle, 'error of law does not prevent its application,' and the

[56] von Staudinger, Kommentar zum Burgerlichen Gesetzbuch, V. 1, p. 350 *et seq.*

[57] Iherings Jahrbucher, 33, pp. 149 *et seq.*, 1893-4.

false, 'error of law is irrelevant on principle because inexcusable,' those various exceptions, which were intended to paralyze the inacceptability of the false proposition, likewise applied to the true proposition, and without wholly attaining their true purpose, have lead here and there to a wholly unwarranted abandonment of the same. Through our doctrine it receives full protection. Where the applicability of the true doctrine begins there, likewise, the most excusable error of law remains irrelevant on principle, and here, consequently, we have the line of division as to identity, between error of law and error of fact."

The comprehensiveness and scientific beauty of the German Civil Code is well seen in Sections 119, 120, 121 and 122, which practically cover the whole extensive field of error. Thus Section 119 broadly declares:

"One who was in error as to the contents of a declaration of will, or who really had not intended to make a declaration of such contents, may contest it if it can be supposed that he would not have made it if he had had knowledge of the situation and had reasonably appreciated the case.

"An error with regard to such qualities of a person or thing which are deemed essential in business transactions, is likewise held to be an error concerning the contents of the declaration."

Sections 120 and 121 relate respectively to errors of transmission, as in the handling of messages by a telegraph company, or other persons, and the term or period in which action may be taken to attack the declaration. The text of Section 120 is as follows:

"A declaration of will that has been transmitted wrongfully by a person or agency employed for such transmission, may be contested under the same conditions as a declaration made erroneously according to Section 119."

The error lies in the incorrect conception, as when the one who declares is not conscious of accord of his will or his intention and his declaration. There is no juristic act if he is incapable of willing, or if, in any way whatsoever, the will is demonstrably absent.[58] The Prussian Code took an objective standpoint and permitted the declaring person to contest the declaration of intention, without considering whether the error could have been avoided or not; but it held him liable, in certain cases, to the other party for his mistake, if the latter was not aware of it. The *Burgerliches Gesetzbuch*[59] takes a subjective and objective view and declares that the following must be considered:

[58] Leske, Burgerliches Gesetzbuch V. 1, § 23; Sohm's Inst. p. 217.

[59] Leske, Burgerliches Gesetzbuch § 23.

1. Error in the contents of the declaration; for instance, identity of the person or thing. But an error as to the legal effect is not an error of contents.[60]

2. Error in the act of declaring, when the one declaring did not intend to make a declaration of such contents, or character—*e. g.*, through slip of tongue or pen.

3. Error concerning such quality of person or thing, which is considered of materiality in the general intercourse, such being held an error only so far as it touched the contents of the declaration.

Error will be taken into consideration, in all of these cases, when it is essential; but to judge of its essentiality not only the subjective standpoint of him who errs, but the objective standpoint of the custom, must be kept in mind, so that, according to Dr. Leske.[61]

"Error becomes essential when it may be presumed that the one who made the declaration, knowing the conditions under which it was made, and with reasonable (objective) appreciation of the case, would not have made his declaration. It is, therefore, immaterial whether the error was excusable or inexcusable, whether an error of fact or an error of law, and whether the recipient of the declaration knew it, or did not know it, or whether he should have known it."

But the contestibility is considered only in connection with the lack of will, or intention, and the declaring person, if he so chooses, may stand by his declaration of will although when he made it he did not understand or desire the consequences. In other words, it depends upon the person in error whether he will plead his ignorance or mistake, or stand by it, taking the consequences, for in no case is the other party or a third person entitled to plead the error of the declaring party.[62]

But, as has been observed, a person cannot contest a declaration of will on the sole ground that he was in error as to its legal effect. Von Staudinger well says:[63]

"Error as to concrete legal relations may be important; error as to the provisions of an objective decree cannot be important. In

[60] Planck, Burgerliches Gesetzbuch, Kommentar, 214.

[61] Burgerliches Gesetzbuch § 23.

[62] Planck, Kommentar zum Burgerlichen Gesetzbuche, 213; Leske, Burgerliches Gesetzbuch § 23.

[63] Kommentar zum Burgerlichen Gesetzbuche 350, 351.

the latter sense it may be said to-day, *'error juris nocet'* (error of law is injurious). For example: If a person declares the acceptance of a solvent inheritance because he believes that therewith he acquires only the assets and not the debts of the testator, he cannot contest; if a person acquires a piece of real estate because he believes it is not encumbered with a mortgage, he may contest if it is so burdened. * * * The maxim formerly maintained by the theory and the Imperial court that error as to the legal effect of a declaration of will does not entitle one to contest, is opposed by Oertmann.[64] Oertmann desires to have understood by 'contents of the declaration' the possible effect of the contents of the declaration. He therefore permits, for example, the contest of a contract for a will concluded under the erroneous impression of its revocability. In our opinion the law does not compel this conception. The interest of public policy opposes it, because if it were consistently carried through it would lead to an insufferable extension of contestibility. If one can contest an agreement respecting claims of inheritance on account of error as to its irrevocability, why then should he be denied the contest of a contract of purchase which he erroneously considered as revocable at will? Many cases must be observed to see whether an error of law is not really an error of motive, which ought not to be taken into consideration. The heir who, from the inheritance makes a present to his cousin because he does not consider him a participant in the inheritance, may contest if he learns that his cousin is his co-heir; he has been in error as to such a quality in the person of his co-contractor, which by common usage in such cases is considered essential; it cannot be seen why legal qualities, like that of being an heir, should not also be taken into consideration here. Let us suppose the case in this way, that the heir gives a present to his cousin because he believes this cousin had made a donation at some time to the testator, while in fact the 'donation' was the payment of a debt. Then the heir cannot very well contest because there is only an error in motive. However, it will not always be easy to draw the line in such cases."

Sections 119-122 of the Code are generally applicable whether the error of law is one of subsumption, which appears when one who knows the provisions of law, but erroneously believes that they do not apply to certain facts—*e. g.*, A borrows a mare and erroneously believes that by virtue of the law he is entitled to the colt that is dropped while his possession continues, or arises in connection with some other section, as Section 248, which governs letters testamentary and contracts of inheritance and provides that for the validity of the acceptance the heir shall know under what

[64] Der Rechtsirrthum im Burgerl. R. Bl. f. RA. Bd. 67 § 1 ff., 25 ff. 45 ff. a. a. O. § 29 ff.

right he is entitled to the inheritance. In the latter illustration, if the error is expressed or implied, the declaration of acceptance is not alone contestible, but void without further action.[65]

While Sections 119 and 120 generally provide that any kind of declaration of intention is voidable on the ground of fundamental error, even if the mistake is unilateral, it is voidable only, and the remedy is coupled with the duty of compensating any one who has incurred damage by relying on the validity of the act. This doctrine of negative interest, or unreceived gain, is one of the most novel propositions of the German Code, and is contained in Section 122, as follows:

"If a declaration of will is void according to § 118, or has been contested on the grounds of §§ 119, 120, the declarant, if the declaration was to be made to another, must pay him, and otherwise to every third party, the damages which such other or third party suffered by reason of the fact that he relied upon the validity of the declaration; provided, however, that such amount do not exceed the interest which such other or third party had in the validity of the declaration.

"The duty to indemnify does not exist if the injured party had knowledge of the cause of nullity, or was ignorant of it by reason of negligence (should have known)."

In other words, if the declaration is void under Section 118, because serious intention was lacking, or is voidable under Sections 119 and 120, he who suffered loss by relying on the effectiveness of the declaration may recover from the declaring party damages limited to the amount of his negative interest, or the gain which he has missed by omitting to conclude another contract, or another business. Thus, if *A* induces *B* to believe that a contract exists, but on account of certain facts or conditions which *B* neither knows, nor is bound to know, and it does not exist, *A*, no matter how innocent, is liable to *B* for the damages he has suffered by rejecting, or failing to take advantage of, some other proposition, suppose of a similar nature, from *X*. But the negative interest is never permitted to exceed the positive interest, the interest in the fulfillment of the contract.[66]

On this unique, yet important subject, Dr. Planck says:[67]

"The liability to damages provided for in § 122 is independent

[65] Leske, Burgerliches Gesetzbuch § 248.

[66] Brock, das Negative Vertragsinteresse § 91. Von Staudinger, Kommentar zum Burgerlichen Gesetzbuche 358.

[67] Planck, Kommentar zum Burgerlichen Gesetzbuche 218, 219.

of the fact whether the declaring person is culpable or not. This is an exception to the principle otherwise maintained in the *Burgerliches Gesetzbuch* that a liability for damages lies only in the case of culpability. Here it is sufficient that the declaring person, through his action, has caused the damage. The presupposition, therefore, of the liability, is only that the declaration has been made, that the same is either void under the provisions of § 118, or because it is contestible under §§ 119 to 121, and that the other party, by relying on the effectiveness of the declaration, has suffered damage.

"Only the so-called negative interest is to be recompensed. The declaration of will is void; the other party, therefore, cannot demand indemnity for that which he would have had if the declaration had been enforceable, but only indemnity for that which he has lost by reason of the fact that he relied on the effectiveness of the declaration.

"For instance, if in a sale the declaration of the seller is void or contestible, and is contested under the provisions of §§ 118 to 121 the purchaser cannot demand compensation for the value of the object of purchase after deduction of the price and recompensation for other damage which he has suffered through the noncompletion of the purchase, but only indemnity for such damages which he has suffered because of the fact that he omitted the possible purchase of another object by relying on the effectiveness of the contract of purchase which now is proved to be void. However, if, what is possible under the circumstances, the amount of the negative interest exceeds that of the fulfillment interest, only the latter amount can be demanded. The proof that the fulfillment interest is lower, must be furnished by the one who is liable. It cannot be correct, as Hoelder [68] assumes, that the person liable could avoid his liabilities by a declaration that he would like to have the void agreement (*Rechtsgeschaft*) remain in force. This, particularly in a case of contest of a mutual contract, would involve great injustice for the opponent of the contestibility who was compelled to believe, by reason of the contest, that the contract had not been perfected.

"If there is a declaration of will which needs to be received (*empfangsbedurftige*) only the recipient may demand damages. A third person who has suffered damage by relying on the declaration of will as being in force, as, for instance, in a contract for the interest of a third person, the third person cannot demand indemnity. In cases of declaration of will which need not be received, for instance in case of auction, every person is entitled to indemnity by reason of the fact that by relying on the declaration of will he has suffered damage. However, in the case of § 151, where the acceptance of the offer of contract need not be declared to the offerer, according to the meaning and purpose of the provision in question, the liability, if the acceptance is contestable and is con-

[68] Kommentar zum Burgerlichen Gesetzbuche § 122.

tested in accordance with the provisions of §§ 119-121, is only on the part of the offerer and not of a third person."

It should be understood, however, that the liability of the offerer does not continue, if the other party, the recipient of the declaration who was damaged, knew the ground of contestability, or should have known it.[69]

V. The Early Rule, Departure and Weight of Authority in England.

In that sociable and copious science, as Coke calls it,[70] the jurisprudence of the common law of England, the earlier cases recognized no distinction between error of law and error of fact. The courts applied the rules that were derived from the civil law, with justice and wisdom, to all civil cases alike. Later, through a misinterpretation, or a misapplication of the governing maxim, "*Ignorantia juris*," etc., a line of decisions was started which, as one writer has so well said,[71] made it for a time "the most discussed, controverted, affirmed, denied and modified theoretically, and at the same time the least agreed upon and applied practically, of any of the epitomized principles of law which have been transmitted to us from the distant past." More recent cases have gone back to first principles, or those enunciated by Lord Mansfield in *Bize* v. *Dickason*.[72] The confusion and doubt which obtained so generally for many years arose thrcugh a misunderstanding of the maxim, or an omission to assign an exact meaning to the term "ignorance of law"; the assertion of propositions as general rules which, as Pollock[73] points out, ought to be taken with reference only to particular effects of errors in particular classes of cases; the failure to distinguish between proximate and remote causes of legal consequences; the rules of pleading; and very largely by the failure to observe the distinction between cases involving the simple question of error of law, and cases of compromise, arbitration and award which are governed by the exception rather than the rule. The mass of *obiter dicta*, therefore, has been misleading to the courts and often productive of serious consequences to the litigants.

The purpose of this paper being to discover whether error of law may afford a sufficient ground for redress in any tribunal the

[69] Lekse, Burgerliches Gesetzbuch § 23. [70] Coke, 28 a.
[71] VI Albany Law Jour. 103. [72] 1 T. R. (1786) 285.
[73] Cont. (7th Ed.) 441.

inquiry will not be directed, except incidentally, as to what is the proper forum in which to seek it, or as to the form of action.

The maxim belongs to some of the earliest rudiments of English jurisprudence. The expounders of the law during the reigns of Henry V and his successors down to that of George III, when Lord Mansfield presided as Chief Justice, did not treat it as being true without considerable limitation [74] as the cases show, and when the jurists refused to make the proper exceptions in civil cases to the general rule justly applicable in criminal law, figuratively speaking, they sowed the winds, leaving to future generations the reaping of the whirlwinds.

Perhaps the earliest reported case on the subject, which treated error of law and error of fact alike and without distinction, is that of *Hewer* v. *Bartholomew*.[75] Here the question of not knowing the law as to payment on a mortgage came up and relief was given without discussion of the principle involved. In *Bonnel* v. *Fouke* [76] the plaintiff, a colemeeter of London, under mistake of law, paid to the Lord Mayor rent which was payable only to the Chamberlain. Recovery was permitted on *indebitatus assumpsit*. In *Turner* v. *Turner* [77] there was a mutual mistake of parties as to titles and the court of equity relieved. The circumstances of the case, however, and the grounds of Lord Nottingham's decision are not so distinctly stated as to safely place this among the authorities.

Onions v. *Tyrer* [78] is a strong authority that the effect of a cancellation of a former will is destroyed by a mistake of law as to the later will being good. "Such a cancelling would not have profited the heir," said Lord Chancellor Cowper, "because it would have been a cancelling proceeding from a mistake; it is no more than if the testator being sick, and having two wills under his pillow, should by mistake give his last one to be cancelled, or order one to cancel his first who by mistake cancels his last."

In *Landsdowne* v. *Landsdowne* [79] a bond and indentures were obtained by mistake of law and were ordered cancelled. It appeared that of four brothers the second died; the eldest entered his lands and the youngest claimed them. They applied to a neighboring schoolmaster for his opinion, which he gave in favor of the youngest, on the ground that lands could not ascend. The

[74] Lyndwood, Provinciale, L. 1, t. 10, pp. 51 & 52.
[75] (1598) Cro. Eliz. 614. [76] (1657) 2 Sid. 4.
[77] (1691) 2 Rep. in Ch. 154. [78] (1716) 1 P. Wms. 343.
[79] (1730) Mos. Rep. 364.

eldest thereupon agreed to divide the land in dispute rather than go to law, though he had the right, and executed a release of the moiety to the youngest and a bond in penalty for his quiet enjoyment of it. The youngest brother afterwards died leaving an infant, on whom the moiety descended. Lord Chancellor King decreed that the bond and conveyance should be delivered up to the eldest brother, declaring that deeds so executed could not be sustained in a court of equity, as it appeared the bonds and indentures had been obtained by mistake and misrepresentation of the law. The report adds:

"And his Lordship said that maxim of law, '*Ignorantia juris non excusat*,' was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases."

In *Pusey* v. *Desbouvrie* [80] a father made his will, giving to his daughter £10,000 on condition that she should release her orphanage part, together with all her claim or right to his personal estate which she might have by virtue of the custom of London. She released her rights to such share in ignorance of its value and of the custom, but the court of equity would not suffer the heir to take advantage of her ignorance whether of law or of fact.

Bingham v. *Bingham* [81] is a case upon which text writers disagree. Belt's Supplement [82] to Vesey's Reports shows the mistake to have been one of law. Story [83] says that relief was given against a mere mistake of law, to which Pollock [84] makes objection and puts the decision on the failure of the subject matter. The plaintiff was entitled to an estate, and was fully apprised of the instrument which created his title to it. He had an opportunity of considering the effect of the instrument and of taking legal advice on it; yet because of his gross ignorance of the law he bought the estate from the defendant who had no claim to it. The case stands on the intention of the parties. The plaintiff, it can hardly be supposed, intended to purchase what was his own or that the defendant intended to sell what did not belong to him. Neither had any doubt at the time of the sale whose land it was. The plaintiff knew there was a will giving it to him, but he was satisfied that the will was invalid. The court of equity decreed for the plaintiff with costs, saying:

"The defendant apprehended he had a right, yet there was a

[80] (1734) 3 P. Wms. 316. [81] (1748) 1 Ves. 126.
[82] 2nd ed. p. 81. [83] Eq. Jurisp. § 124. [84] Cont. (7th ed.) 491.

plain mistake, such as the Court was warranted to relieve against and not suffer the defendant to run away with the money in consideration of the sale of an estate to which he had no right."

Farmer v. *Arundel* [85] is notable for the so-called dicta of Chief Justice De Grey, which has been cited and commented upon in later cases, and which Chambre, *J.*, in *Brisbane* v. *Dacres* [86] insists is not a mere dictum but is a main part of the argument. This was an action for money had and received, on the ground that the defendant having no right to demand the money for the maintenance of the pauper had no right to retain it, and the Chief Justice observed:

"Where money is paid by one man to another, on a mistake either of fact or of law, or by deceit, this action will certainly lie."

Ancher v. *Bank of England* [87] turned on the legal effect of an endorsement restraining the negotiability of a bill. Lord Mansfield set aside the non-suit without discussing the error of law.

Jones v. *Morgan* [88] which is frequently cited as an authority to the same effect, is not properly such, because what Lord Thurlow said was purely obiter. "If these presumptions were upon a mistaken notion of the law," he said, "it might be set aside at any distance of time, but here appears to have been no such mistake."

The most notable case on the subject was that of *Bize* v. *Dickason* [89] in which the question of error of law was clearly before the court, and Lord Mansfield, with his broad and enlightened views of equity and justice, met it squarely, reiterating an opinion expressed twenty-one years earlier in *Moses* v. *Macferlan* [90] in an endeavor to soften the rigor of a rule as to *indebitatus assumpsit* not in keeping with the doctrines of a court of conscience. Here were mutual debts between two persons, and one of them becoming bankrupt, the other instead of setting off his own claim, as he might have done, paid the assignee in full. It was held that he might recover an amount corresponding to that which he had neglected to set off. In rendering judgment Lord Mansfield said:

"The rule has always been that, if a man has actually paid what the law would not have compelled him to pay, but what in equity and conscience he ought, he cannot recover it back."

With an illustration of a debt barred by the statute of limitations, or contracted in infancy, his Lordship continued:

[85] (1772) 2 W. Bl. 824.
[86] (1813) 5 Taunt. 143.
[87] (1781) 2 Doug. 637.
[88] (1783) 1 Brown Ch. R. 206.
[89] (1786) 1 T. R. 285.
[90] (1760) 2 Bur. 1005.

"But, where the money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

A year later, in *Evans* v. *Llewellyn* [91] a conveyance from persons uninformed of their rights was set aside, though there was no actual fraud or imposition.

In *Chatfield* v. *Paxton* [92] appears the intimation of Lord Kenyon that "a payment made under an ignorance of the law would enable the plaintiff to recover back the money."

The foregoing cases must all have been published in the reports, accessible to jurists, barristers and attorneys of the times, and it seems most remarkable that a principle which had been recognized in the courts, and of record, for two hundred years, as fond as the English courts are of their precedents, should suddenly, and without reason, be lost sight of, or cast aside, and a new line of decisions, less honest and equitable, be permitted to exercise their baneful influence upon society. But history records that this is sadly true, and at this late day the text writers, though harmonious as to principle, are woefully in conflict as to which side can justly claim the weight of authority.

Bilbie v. *Lumley*[93] is the leading case holding that error of law is without a remedy, and Lord Ellenborough is the author of the doctrine. This was a case wherein an underwriter had paid the loss by capture upon a policy of insurance knowing that a letter very material to the risk had been concealed, but ignorant of the legal effect of such concealment. The underwriter brought an action for money had and received. Lord Ellenborough, *C. J.*, asked the plaintiff's counsel whether he could state any case where, if a party paid money to another voluntarily with a full knowledge of all the facts of the case, he could recover it back again on account of his ignorance of the law. Well-informed counsel could have cited several such cases, but no answer being given, his Lordship continued:

The case of *Chatfield* v. *Paxton* [94] is the only one I ever heard of, where Lord Kenyon, at *nisi prius* intimated something of that sort. But when it was afterwards brought before this Court, on a motion for a new trial, there were some other circumstances of fact relied on; and it was so doubtful at last on what precise ground the case turned, that it was not reported. Every man

[91] (1787) 2 Browns Ch. 150. [92] (1799) Cited in 5 Taunt. at p. 155.
[93] (1802) 2 East 469. [94] (1799) Cited in 5 Taunt. at p. 155.

must be taken to be cognizant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case. In *Lowrie* v. *Bourdieu* [95] money paid under a mistake of the law was endeavored to be recovered back; and there Buller, J., observed that *'ignorantia juris non excusat.'* "

This is a hasty and not well-considered opinion by Lord Ellenborough, as shown by a subsequent opinion delivered nine years later in *Perrott* v. *Perrott,*[96] in which he said:

"Mrs. Territt mistook either the contents of her will, which would be a mistake of fact; or its legal operation, which would be a mistake in law; and in either case we think the mistake annulled the cancellation. *Onions* v. *Tyrer* [97] is a very strong authority that a mistake in point of law may destroy the effect of the cancellation. And when once it is established, as it clearly is, that a mistake in point of fact may also destroy it, it seems difficult upon principle to say that a mistake in point of law, clearly evidenced by what occurs at the time of cancelling, should not have the same operation."

From this latter case it seems morally certain that had *Bilbie* v. *Lumley* [98] followed and not preceded it, the decision would have been the other way. However *Bilbie* v. *Lumley* may have been received by the jurists of that age, in this generation when the modern mind is reconsidering the reasons for many of the old and popularly accepted principles, the decision looks very bad in the light of analysis and technical inquiry. To begin with, it is built upon sand rather than upon rock foundation, for Mr. Justice Buller's use of the maxim *"ignorantia juris,"* etc., was entirely uncalled for, irrelevant and out of place. It was *obiter dictum* pure and simple, because the case was decided upon the ground of illegality, in that the subject matter was a gaming policy condemned by an act of Parliament. It has been insisted that Lords Mansfield and Ashhurst should not have suffered the dictum to pass without animadversion if they had not assented to its correctness,[99] but the argument is quite unimportant in the consideration of the question.

Lord Ellenborough's reason, "every man must be taken to be cognizant of the law," is but a free translation of *"ignorantia juris non excusat,"* and without a proper appreciation of its meaning. To give force and effect to his words they imply that

[95] (1780) 2 Dougl. 468. [96] (1811) 14 East 423.
[97] (1716) 1 P. Wms. 343. [98] (1802) 2 East 469.
[99] See Note in 15 American Reports, pp. 171 *et seq.*

if the plea *"ignorantia juris non excusat"* can be held sufficient in one case it must be held sufficient in all cases, and admittedly that would not be a good policy. But would not this plea, like any other, to avail anything, have to be established by competent evidence? Or, if it could not be satisfactorily proved, would it ever be urged? Again, if Lord Ellenborough was influenced by the belief that to allow such a plea a premium would be placed upon ignorance, is there not the same danger in entertaining a plea of ignorance of facts?

The difficulties which have followed Lord Ellenborough's decision in a long chain, are due not so much to the maxim itself but to his misinterpretation and perverted application of it. The maxim has no relevancy to the case of a man seeking to recover back money paid by him in misapprehension of his legal rights, although it has been so cited and misapplied. The word "excuse" imports delinquency; the commission of a crime or a tort; the breach of some contractual obligation; that there is something to be excused, or a defendant who seeks justification for his acts.[100] As said by Sir W. D. Evans:[101]

"The effect of the doctrine is carried sufficiently far for the purpose of public utility, by holding that no man shall exempt himself from a duty, or shelter himself from the consequences of infringing a prohibition imposed by law, or acquire an advantage in opposition to the legal rights and interests of another, by pretending error or ignorance of the law."

Another learned writer on the same subject, after a most painstaking investigation, adds:[102]

"To say that ignorance shall be no excuse for a wrong done, a duty neglected or a right withheld is intelligible and meets the force of language. But to speak of excusing a man for asking to have what, in all honesty is clearly his, or for declining to do what he is under no obligation, legal or moral, to do, is plain perversion of language and is altogether preposterous."

Lord Ellenborough's rejection of the "intimation" of Lord Kenyon as not affording sufficient authority to decide in favor of the plaintiff, naturally raises the presumption that he was influenced by some overwhelming reason, or authority. Poor as his reason is, his authority is worse, the case of *Lowry* v. *Bourdieu*,[103] involving the simple question of illegality, with Lord Buller's

[100] Keener Quasi Cont. pp. 87 *et seq.* [101] 2 Poth. Obs., 340.
[102] XXIII Am. Jur. 157. [103] (1780) 2 Dougl. 468.

dictum. Nine years later, after he had informed himself more fully on the subject of error, his Lordship's views as to the interpretation of the maxim changed wonderfully. His later decision in *Perrott* v. *Perrott*,[104] therefore, damages if it does not destroy the authority of the leading case, for he recants its doctrine altogether.

In 1807, five years after his remarkable decision, Lord Ellenborough refused to extend the principle to executory contracts and held that a mistake of law was a defense to an action on a mere promise.[105] The doctrine also was not followed in another case [106] decided about the same time, in which Lord Eldon decreed that a lease with covenants for perpetual renewal under a Church-lease renewable upon fines continually increasing, be delivered up on the ground not of fraud, but of surprise, neither party understanding the effect of it. A year later the case of *Stevens* v. *Lynch* [107] was decided, which is cited by some authorities as supporting *Bilbie* v. *Lumley*,[108] but manifestly it is a crumbling pillar. This case is that of a drawer of a bill of exchange, who, knowing that time had been given by the holder to the acceptor, but apprehending that he was still liable on the bill in default of the acceptor three months after it was due, said that he knew he was liable, and, if the acceptor did not pay, he would. The Court held him bound by such promise, regardless of error of law. Query: How, on principle, can the promise of an endorser, or drawer of a bill, after having been discharged by laches, be held legally binding? He was absolutely discharged before his promise; and the new promise was utterly without consideration.

Bilbie v. *Lumley* [109] probably would have been consigned to oblivion with other repudiated cases, but unfortunately along came Sir Vicary Gibbs who rescued it, placed it upon the altar and worshipped it as exemplifying a great principle recognized in insurance transactions. And thus *Brisbane* v. *Dacres* [110] came to be recognized as the case which perpetuated the memory of its lamented predecessor, and some eminent authorities [111] insist that it established the law for England and the United States. Inasmuch as such great responsibility is thus thrown upon this case,

[104] (1811) 14 East 423.
[105] Herbert *v.* Champion (1807) 1 Campb. 134.
[106] Willan *v.* Willan (1809) 16 Ves. 72. [107] (1810) 12 East 38.
[108] (1802) 2 East 469. [109] (1802) 2 East 469.
[110] (1813) 5 Taunt. 143.
[111] Scott, Quasi Cont. 365 n.; Am. & Eng. Encyl. of Law, 2nd Ed., 1102.

it may be well to examine the opinions of the four members of the court, delivered *seriatim,* and ascertain its true value as an authority.

Brisbane v. *Dacres,*[112] briefly stated, was the case of a captain in the navy, attached to the Jamaica Squadron under command of Admiral Dacres, who with knowledge of the facts, but under a mistake of law, paid over to the Admiral, who claimed it as a right, one-third of the freight on certain public bullion transported on his ship from the West Indies to England. This money he was not compellable to pay. With a variety of reasoning the court held, three to one, that the Captain, on discovering what his legal right was, could not recover back what he had paid, there being nothing against conscience in the other party's retaining it.

Mr. Justice Gibbs, who is the only English judge who has undertaken anything like an elaborate argument to support the proposition that mistakes of law are irremediable, put the case squarely on that ground. He commented upon the cases of *Chatfield* v. *Paxton,*[113] in which he appeared as counsel for the defendant, and admitted that Lord Kenyon had ruled that "a payment made under an ignorance of the law would enable the plaintiff to recover back the money" (which, it may be remarked, seems to have been a very intelligible intimation on the part of his Lordship); *Farmer* v. *Arundel*[114] and the "dictum" of Chief Justice De Grey; *Lowrie* v. *Bourdieu*[115] and *Bilbie* v. *Lumley*[116] upon which he based his argument. The importance of *Lowry* v. *Bourdieu,* in his opinion was the dictum of Buller, J., that "where there is no mistake of fact, or ignorance of fact, the money cannot be recovered back, for the rule applies, that '*ignorantia legis non excusat.*'"

"This distinction," said Mr. Justice Gibbs, "was thus pointedly stated in the presence of Lord Mansfield, who heard it and whose attention must be called to it" (and Lord Mansfield), "expresses no dissatisfaction with it." What an argument to be employed in the foundation of a judicial opinion! The declaration on the part of Buller, J., was mere dictum, inasmuch as the case was decided on the ground of illegality, and what was said of ignorance of the law was entirely irrelevant and uncalled for. But assuming that this is not *obiter,* it was clearly discredited, if not retracted

[112] (1813) 5 Taunt. 143.
[113] (1799) Cited in 5 Taunt. at p. 155.
[114] (1772) 2 W. Bl. 824.
[115] (1780) 2 Doug. 468.
[116] (1802) 2 East 469.

six years later in *Bize* v. *Dickason,*[117] which was tried originally before Buller, J. The unanimous opinion was delivered by Chief Justice Mansfield, and Buller, J., sat with him, a member of the same court. But what bearing has it upon *Brisbane* v. *Dacres,*[118] whether Lord Mansfield heard without comment Buller's *obiter* or not?

Coming to Lord Ellenborough's important decision in *Bilbie* v. *Lumley* [119] and his query to uninformed counsel, after commenting upon the practice in insurance transactions, Gibbs, J., adds:

"Now, this was a direct decision upon the point, certainly without argument; but the counsel, whose learning we all know and who was never forward to give up a case which he thought he could support, abandoned it. I think on principle that money which is paid to a man who claims it as his right, with a knowledge of all the facts, cannot be recovered back. I think it on principle, and I think the weight of authorities is so, and I think that the dicta that go beyond it are not supported or called for by the facts of the cases. *Bilbie* v. *Lumley* [120] I think is a decision to that effect; and for these reasons I am of opinion the plaintiff is not entitled to recover."

And this is the supporting argument, which has had such a tremendous importance in the jurisprudence of England and the United States!

But even Mr. Justice Gibbs was constrained to do homage to the just and reasonable doctrine of Lord Mansfield,[121] for he "had considerable difficulty in saying that there was anything unconscientious in Admiral Dacres in requiring money to be paid to him, or in receiving it when paid."

What would have been the decision on this vital question, one may ask, if Mr. Justice Gibbs had had presented to his attention, which was not done, by counsel, the later opinion of Lord Ellenborough, delivered two years before in *Perrott* v. *Perrott,*[122] wholly discrediting that of *Bilbie* v. *Lumley.*[123]

Chambre, J., who followed Mr. Justice Gibbs, dissented and is thought by very many to have had the better of the argument. He said in part:

"I think there are sufficient authorities to say this person has paid this money in his own wrong, and that it may be recovered

[117] (1786) 1 T. R. 285. [118] (1813) 5 Taunt. 143.
[119] (1802) 2 East 469. [120] (1802) 2 East 469.
[121] Bize *v.* Dickason (1786), 1 T. R. 285. [122] (1811) 14 East 423.
[123] (1802) 2 East 469.

back. In the case of *Bilbie* v. *Lumley* [124] there was a letter said to have been concealed, that ought to have been disclosed: this letter was shown to the underwriters, and they after reading it thought fit to pay the money. Now there the maxim *'volenti non fit injuria'* applies: in that case all argument was prevented by a question put by the court to the counsel. I am not aware of any particular danger in extending the law in cases of this sort, for they are for the furtherance of justice; neither do I see the application of the maxim used by Buller, J., in the case of *Lowry* v. *Bourdieu,*[125] and cited by the Court in *Bilbie* v. *Lumley,* [126] *'ignorantia juris non excusat'; it* applies only to cases of delinquency, where an excuse is to be made: I have searched far to see if I could find any instance of similar application of this maxim. I have a large collection of maxims, but can find no instance in which this has been so applied. I cannot see how it applies here. In *Lowry* v. *Bourdieu* [127] the decision turned on the transaction being illegal, and it being illegal, the maxim applied, *'in pari delicto potior est conditio defendentis'; Moses* v. *Macfarlan,*[128] and a number of subsequent cases decide, that where the plaintiff is entitled *'ex æquo et bono'* to recover, he may recover. In *Farmer* v. *Arundel* [129] the opinion of De Grey is not a mere dictum, it is part of the argument, it is a main part of the argument. He there says where money is paid under a mistake either of fact or of law or by deceit, this action will certainly lie. It seems to me a most dangerous doctrine, that a man getting possession of money, to any extent, in consequence of another's ignorance of the law, cannot be called on to repay it. * * * As to the insurance cases that have been cited, a great deal of fabricated law has been newly created within a few years, and the courts have to decide on difficult and complex causes; but those doctrines must not be carried into the general law, but confined to the occasions which give rise to them."

Heath, J., followed with a brief opinion and said:

"There are two questions in this case. As to the question whether a payment made under ignorance of the law without ignorance of the facts will enable a man to recover his money back again, it is very difficult to say that there is any evidence of ignorance of the law here."

The symposium was completed by Chief Justice (not Lord) Mansfield, who added:

"The maxim *'volenti non fit injuria'* applies most strongly to this case. * * * We do not feel ourselves called upon to overrule so express an authority as *Bilbie* v. *Lumley.*" [130]

[124] (1802) 2 East 469.
[125] (1780) 2 Doug. 468.
[126] (1822) 2 East, 469.
[127] (1780) 2 Doug. 468.
[128] (1760) 2 Burr. 1005.
[129] (1772) 2 W. Bl. 824.
[130] (1802) 2 East, 469.

Currie v. *Goold,*[131] which was decided four years later, at first glance might be understood to hold that a mistake of law is without remedy. The facts, as reported, are meager, but it does not appear conclusively from anything said by Vice Chancellor Plumer that he put the case on that ground. The agent of an executor had paid interest on a legacy for seventeen years without deducting the property tax, and it was held that he could not afterwards deduct out of future interest the amount of the property tax on such precedent payments. Counsel cited two or three cases, including *Nichols* v. *Leeson,*[132] which held that "where an annuity is given to a relation for life and it has been paid for a number of years wthout deduction for land tax it will be presumed to have been so paid by mutual consent, and the payer is not entitled to be relieved" because there was "no just ground to decree back arrears, and it would be a mischievous consequence to do it." He also cited *Stevens* v. *Lynch* [133] and *Bilbie* v. *Lumley.*[134] The Vice Chancellor approved without comment the authorities mentioned, and added that the defendant being in business probably made some advantage by the capital being suffered to remain in his hands instead of being paid into court and probably he made no claim of the property tax as an inducement to leave the money in his hands. If he paid what the law would not have compelled him to pay, but what in equity and conscience he ought, this case represents the true rule announced by Lord Mansfield in *Bize* v. *Dickason,*[135] rather than the false doctrine of Lord Ellenborough.[136]

It is worthy of note, also, that Vice Chancellor Plumer, two years previously, in *Howell* v. *George,*[137] refused to decree specific performance of an agreement to sell an estate in fee by one who supposed he was absolute owner of the estate, when he was only tenant for life under a settlement with a proviso empowering him to purchase an estate in fee simple in possession, in some convenient place in England, of equal or better value, and to settle the same in lieu of the settled estate, which was then to be his own. The mistake upon which the decision turned was purely one of law.[138]

Another case often cited as supporting Lord Ellenborough's early interpretation of the maxim, is that of *Bramston* v. *Robins,*[139]

[131] (1817) 2 Mad. Ch. 163. [132] (1747) 3 Atkyn's Ch. R. 573.
[133] (1810) 12 East 38. [134] (1802) 2 East 469.
[135] (1786) 1 T. R. 285. [136] Bilbie *v.* Lumley (1802) 2 East 469.
[137] (1815) 1 Mad. 1. [138] Pomeroy, Specific Performance § 245, N. 1.
[139] (1826) 4 Bing. 11.

where a tenant, during a period of seventeen years, had been allowed to deduct from his rent, on account of payment for the land tax, a sum larger than the amount of the tax, which the landlord was liable to pay. The defendant, as bailiff of the landlord distrained for rent in arrears, being the excess which the tenant had deducted above the actual amount of the tax. Replevin was brought by the plaintiff, a partner of the assignee of the premises, since the assignment to whom, without deduction for land tax, the full rent had been paid. While it was held that it was not against good conscience to retain the money, it does not appear that the case proceeded upon the ground of a mistake of law. "No man can be held by any act of his to confirm a title," said Sir John Leach, Master of the Rolls, in *Cockerell* v. *Cholmely,*[140] "unless he was fully aware at the time, not only of the facts upon which the defects of title depend, but of the consequences in point of law; and here there is no proof that the defendant at the time of the acts refered to was aware of the law on the subject." This case was one of equity relieving against the defective execution of a power.

One of the favorite cases which text writers are pleased to classify in their column under *Bilbie* v. *Lumley,*[141] with *Stevens* v. *Lynch,*[142] *Brisbane* v. *Dacres,*[143] *Goodman* v. *Sayres,*[144] is that of *Stewart* v. *Stewart,*[145] which contains quite a collection of authorities. Unfortunately for their contention, however, the case and the authorities cited therein do not stand for the simple and unadorned principle that there is no relief against an error of law. But they do stand for that similar and undisputed principle, recognized as an exception of the Civil Code of France [146] and the Roman law [147] that a compromise, deliberately entered into under advice, the party's agents and advisers having the question fully before them, cannot be set aside because a particular point of law may have been overlooked or misapplied.[148]

In this case a widow and other relatives of a domiciled American who died entitled to considerable personal estate in the hands of trustees in Scotland, agreed to compromise their respective claims to the succession, by the advice of their law agent, taking

[140] (1830) 1 Russ. & M. 418. [141] (1802) 2 East 469.
[142] (1810) 12 East 38. [143] (1813) 5 Taunt. 143.
[144] (1820) 2 Jacobs and Walker 249. [145] (1839) 6 Cl. & F. 911.
[146] Code Napoleon Art. 2052.
[147] Colquhoun, Summary of Roman Law Vol. 3. p. 127.
[148] Pollock (7th Ed.) Cont. 455.

equal shares. The widow, finding that by the law of Scotland she might have claimed more, took proceedings in Scotland to rescind the agreement, on the ground of ignorance of her legal rights and the erroneous advice of the law agent. The authorities on the subject on both sides were fully considered by Lord Chancellor Cottenham, and the result was the affirmance of the agreement. The House of Lords approved the decree. This case, and the authorities cited by Lord Cottenham, give effect to the maxim in all of its legitimate consequences, that a compromise is not to be set aside on account of an error of law.[149]

"The real consideration and motive of a compromise," says Pollock,[150] "as well in our law as in the civil law and systems derived from it, is not the sacrifice of a right but the abandonment of a claim." [151] When an intending litigant forbears in good faith a right to litigate a question of law or fact which is not vexatious or frivolous, he gives up something of value, which is good consideration for a promise even though the claim is not well-founded, provided it is honestly believed in and there is no concealment.[152] It is not his intention to release or surrender his title, but the act or agreement proceeds upon the supposition that he has none.[153]

Lord Cottenham's authorities, which Story [154] seems to think important, when carefully examined, are seen to stand for compromises of doubtful rights, family arrangements releasing rights under a will, or agreements in cases of disputed deeds. As stated by Lord Eldon, in *Stockley* v. *Stockley,*[155] family compromises are favored, if reasonable and upon a doubtful right, even in the strongest case, as where one party was drunk at the time. Lord Eldon also intimated that a different rule might apply between strangers, which has caused this case to be cited in support of the other side of the question, for granting relief. The strongest of these compromise cases, however, cannot properly be classed in support of the doctrine of *Bilbie* v. *Lumley.*[156]

Neither *Milnes* v. *Duncan,*[157] nor *Platt* v. *Bromage* [158] is author-

[149] Goodman *v.* Sayres (1820) 2 Jac. & W. 249.

[150] Contracts (7th Ed.) 193.

[151] Trigge *v.* Lavallée (1861) 15 Moo. P. C. 271; Leonard *v.* Leonard (1812) 2 Ball & B. 171.

[152] Miles *v.* New Zealand &c. Co. (1885) 32 Ch. D. 266.

[153] Burge's Comm. V. 3, 743; Cann *v.* Cann (1721) 1 P. Wms. 723.

[154] Equity Jurisprudence § 138. [155] (1812) 1 Vesey & Bea. 23.

[156] (1802) 2 East 469.

[157] (1827) 6 B. & C. 671. [158] (1854) 24 L. J. (N. S.) Ex. 63.

ity for refusing to relieve against error of law, though both are sometimes cited as such. The former contains a dictum of Mr. Justice Bailey, the decision being based on an error of fact. In the latter case the jury was not satisfied that there was an error of law.

In *Cooper* v. *Phibbs*[159] Lord Westbury attempts to get away from the doctrine of *Bilbie* v. *Lumley*,[160] but as he bases his distinction on the ground of expediency rather than upon principle he has not aided in distinguishing between mistake of private right and mistake of general law. Here the owner of a fishery, in consequence of a misapprehension of the legal effect of certain instruments of a family arrangement and the terms of a private Act of Parliament, had taken a lease of a fishery at a considerable rent in ignorance of his own proprietary rights. The House of Lords, reversing the Lord Chancellor of Ireland, rescinded the lease. Lord Westbury, delivering the opinion, undertook to explain the maxim "*ignorantia juris haud excusat*," and said:

"In that maxim the word '*jus*' is used in the sense of denoting general law, the ordinary law of the country. But when the word '*jus*' is used in the sense of denoting a private right, that maxim has no application. Private right of ownership is a matter of fact; it may be the result also of matter of law; but if parties contract under a mutual mistake, and misapprehension as to their relative and respective rights, the result is that that agreement is liable to be set aside as having proceeded upon a common mistake."

But, as Pomeroy says:[161]

"A private legal right, title, estate, interest, duty or liability is always a very complex conception. It necessarily depends so much upon conditions of fact that it is difficult, if not impossible, to form a distinct notion of a private legal right, interest or liability, separated from the facts in which it is involved and upon which it depends. Mistakes, therefore, of a person with respect to his own private legal rights and liabilities, may be properly regarded—as in great measure they really are—and may be dealt with as mistakes of fact."

Therefore, to determine whether the misconception of private right is due primarily to mistake of fact or mistake of law, is impracticable if not impossible.

This case would seem to fall under the principle of the Roman

[159] (1867) L. R. 2 H. L. 170. [160] (1802) 2 East 469.
[161] Eq. Jur. § 849.

law [162] that a person agreeing for the purchase or hire of his own property forms no valid contract. This, as pointed out by one authority,[163] according to the distinction taken by Savigny, would not be a case for error, in the sense of modifying the effect of a contract entered into, but rather of the absence of the requisites to a true contract; and on the same principles the error would not operate intrinsically and *per se*, but only as evidence of the absence of that without which no valid contract could be formed.

Whether *Cooper* v. *Phibbs* [164] caused any important modification of the doctrine of Lord Ellenborough in *Bilbie* v. *Lumley* [165] or not, and Sir Frederick Pollock [166] insists that the qualification is not admitted as to the recovery of money paid by mistake, other and later cases have lessened the importance of Lord Ellenborough's distinction between mistakes of fact and mistakes of law, if indeed they have not destroyed it altogether.[167] Thus in *Stone* v. *Godfrey,*[168] the tenant having been advised that he was not tenant by the curtesy, on the assumption that he had no such right, concurred in a partition suit. Twenty-two years later he filed a bill to be relieved from the trusts on the ground of mistake, and to have his title by the curtesy established. Both the Master of the Rolls and the Court of Appeals held that the plaintiff was barred on the ground of equitable estoppel. As to the question of mistake of law, Lord Justice Turner said:

"This Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact. When, however, parties come to this Court to be relieved against the consequences of mistakes in law, it is, I think, the duty of the Court to be satisfied that the conduct of the parties has been determined by those mistakes, otherwise great injustice may be done."

The opinion was consistently followed by the same court four years later in *Broughton* v. *Hutt.*[169] Here the heir-at-law of a shareholder in a company joined with several other shareholders in a deed of indemnity to the directors, believing that the shares had descended to him as real estate, whereas they were personal

[162] Digest 50, 17, 145; Code 4, 65, 20.

[163] Solicitors Journal & Reporter V. 13, p. 809.

[164] (1867) L. R. 2 H. L. 170. [165] (1802) 2 East 469.

[166] Cont. (7th Ed.) 457.

[167] Fry, Spec. Perf. (3d Ed.) 381; Solicitors Journal & Reporter V. 13, 809.

[168] (1854) 5 De. G. M. & G. 76. [169] (1858) 3 De G. & J. 501.

estate. The deed was held to be void against him in equity at all events, and probably at law.

Vice Chancellor Sir William Page Wood expressed the same view in *Re Saxon Life Assurance Society.*[170] The *A* Insurance Company purchased the business, received the assets and undertook the liabilities of the *B* Insurance Company. A creditor of the *B* company cancelled his security and accepted a substituted security of the *A* company. The purchase having been declared void as *ultra vires* it was held that the court had jurisdiction to relieve against a mistake in law and that the creditor should be remitted to his original rights against *B* company. "A question has sometimes arisen how far this Court can interfere to rectify a mistake in law," said the Vice Chancellor, "but having regard to all the authorities and especially to *Stone* v. *Godfrey,*[171] I have no doubt of the jurisdiction."

The modern case on the subject is that of *Rogers* v. *Ingham* [172] which, though holding that the court will not relieve in all cases against a payment under a mistake of law—*i. e.*, in compromise—approved the opinions of Lord Justice Turner [173] and Lord Brougham [174] that the court has the power to give relief. An executor, on the advice of counsel on the construction of a will, proposed to divide in certain proportions a fund between two legatees. One of the legatees being dissatisfied took the opinion of counsel, which agreed with the former opinion. The executor then divided and paid over the fund in accordance with the opinions. Two years later the dissatisfied legatee filed a bill against the executor and the other legatee, alleging that the will had been wrongly construed, and claimed repayment from the other legatee. The prayer was denied, but the decision appears to have been based on the fact that the complainant, after deliberation and advice, having chosen one of two courses, could not repudiate his election, rather than on the ground that there could be no recovery of money paid under mistake of law. Lord Justice James, delivering judgment, said:

"I have no doubt that there are some cases which have been relied on in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied

[170] Anchor case (1862) 2 J. & H. 408.
[171] (1854) 5 De G. M. & G. 76. [172] (1876) L. R. 3 Ch. 351.
[173] Stone *v.* Godfrey (1854) 5 De G. M. & G. 76.
[174] Clifton *v.* Cockburn (1834) 3 Myl. & K. 76.

in this Court; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties."

Lord Justice Mellish added:

"I am entirely of the same opinion. There is no doubt, as was said by Lord Justice Turner,[175] that 'this Court has power (as I feel no doubt that it has) to relieve against mistakes in law as well as against mistakes in fact,' that is to say, if there is an equitable ground which makes it, under the particular facts in the case, inequitable that the party who received the money should retain it."

And Baggallay, J. A., said in conclusion:

"I am of the same opinion, and I merely wish to add that while I give a general assent to the passage in the judgment of Lord Brougham [176] which has been referred to in the course of the argument, in which he expressed himself to the effect that cases might arise in which it would be the duty of the court to relieve against an error of law, I do not think that the present is a proper case for the application of such principle."

Again, in the later case of *Daniel* v. *Sinclair*,[177] where a mortgage account had been settled on the footing of compound interest, with half-yearly rests, both parties wrongly understanding the mortgage deed to require the same, it was held that the account might be reopened. Sir Robert P. Collier, delivering the judgment of their Lordships, says:

"Undoubtedly there are cases in the courts of common law in which it has been held that money paid under a mistake of law cannot be recovered. * * * But in equity the line between mistakes in law and mistakes in fact has not been so clearly and sharply drawn. In *Earl Beauchamp* v. *Winn*,[178] Lord Chelmsford observes: 'With regard to the objection that the mistake (if any) was one of law and that the rule *"ignorantia juris neminem excusat"* applies, I would observe on the peculiarity of this case that the ignorance imputable to the party was a matter of law arising upon the doubtful construction of a grant. That is very different from the ignorance of a well-known rule of law; and there are many cases to be found in which equity, upon a mere mistake of the law, without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such a mistake.'

[175] Stone *v.* Godfrey (1854) 5 De G. M. & G. 76.
[176] Clifton *v.* Cockburn (1834) 3 Myl. & K. 76, 99.
[177] (1881) L. R. 6 App. Cas. 181. [178] (1873) L. R. 6 H. L. 223.

"In *Cooper* v. *Phibbs*,[179] Lord Westbury says: 'Private right of ownership is a matter of fact; it may be also the result of matter of law; but if parties contract under a mutual mistake as to their relative and respective rights, the result is that that agreement is liable to be set aside, as having proceeded upon a common mistake.'

"In *McCarthy* v. *Decaix*,[180] where a person sought to be relieved against a renunciation of a claim to property, made under a mistake as to the validity of a marriage, the Lord Chancellor (Brougham) observes: 'What he has done was in ignorance of law, possibly of fact; but in a case of this kind this would be one and the same thing.'

"In *Livesey* v. *Livesey*,[181] an executrix who under a mistake in the construction of a will had overpaid an annuitant, was permitted to deduct the amount overpaid from subsequent payments."

Lord Brougham, in *Clifton* v. *Cockburn*,[182] three years after his decision in *McCarthy* v. *Decaix*,[183] although the case did not turn principally on the point of error of law, said:

"The distinction, it may be observed, is somewhat more easy to lay down in general terms than to follow out in particular cases, even as regards the application of the rule, admitting it to be a correct one, and I think I could without much difficulty put cases in which a court of justice, but especially a court of equity, would find it an extremely hard matter to hold by the rule and refuse to relieve against an error of law."

Eaglesfield v. *Marquis of Londonderry*[184] is classed with these cases because a mutual error as to a collateral matter of law was committed, yet it is without much value as an authority. It appears that new stock of a company was issued and purchased on the supposition that it would have a preference, which, in fact, the company had no power to give it. Jessel, Master of the Rolls, held the company and directors liable to make good their representations to the plaintiff and either issue preferred stock or repay the purchase money. The Court of Appeals reversed him, finding no generic difference between the thing contracted for and the thing purchased; that there had been a common misconception of law, but as the plaintiffs knew what they bought, and had not been deceived, they were not entitled to the relief sought. In other words, the defendant had "ground to claim in conscience" and the plaintiffs could not recover, which is quite within Lord Mansfield's rule.[185]

[179] (1867) L. R. 2 H. L. 149. [180] (1831) 2 Russ. & Myl. 614.
[181] (1827) 3 Russ. 287. [182] (1834) 3 Myl. & Keen, 76.
[183] (1831) 2 Russ. & Myl. 614. [184] (1876) L. R. 4 Ch. D., 693.
[185] Bize *v.* Dickason (1786) 1 T. R. 285.

Money paid into court, or to a receiver or officer of the court, in mistake of law will be repaid or distributed according to the law as soon as the mistake is discovered. Thus Lord Justice James said in *Ex parte James.*[186]

"I think that the principle that money paid under a mistake of law cannot be recovered, cannot be pressed too far, and there are several cases in which the Court of Chancery has held itself not bound strictly by it. The Court, finding that its officer, a trustee in bankruptcy, has in his hands money which in equity belongs to some one else, ought to set an example to the world by paying it to the person really entitled to it. In my opinion the Court of Bankruptcy ought to be as honest as other people."

Mellish, *L. J.*, added:

"I entirely agree with the observations of the Lord Justice."

And in *Ex parte Simmonds* [187] Lord Escher said that the rule that a person who has received money paid to him under mistake of law may retain it, has been adopted by courts of law to put an end to litigation; but the court has never intimated that it is a high-minded thing to keep money in this way; and although the court will not prevent a litigant party from acting in this way, it will not act so itself, and it will not allow its officers to do so. "It will direct its officers to do what any high-minded man would do," he added, "namely, not to take advantage of the mistake of law."

In the recent case *In re Brown,*[188] where money had been paid to a trustee in litigation in mistake of law, following *ex parte James* [189] and *ex parte Simmonds,*[190] Kay, *J.*, observed:

"I have no doubt or hesitation in saying that a Court of the Chancery Division does not consider itself bound to act on principles less honest than the Court of Bankruptcy."

Likewise, *In re Hulkes,*[191] decided the same year, held that executors, though liable to be charged with 4% interest on sums improperly paid, are not liable to interest to the legatee, to whom, with full knowledge on his part and in common mistake (of law, in construing a will) payments had been erroneously made. Forty years earlier Lord Langdale, as Master of the Rolls in *Dibbs* v.

[186] (1874) L. R. 9 Ch. Ap. 609, 614.
[187] (1885) L. R. 16 Q. B. D. 308.
[188] (1886) L. R. 32 Ch. D. 597.
[189] (1874) L. R. 9 Ch. Ap. 609.
[190] (1885) L. R. 16 Q. B. D. 308.
[191] (1886) L. R. 33 Ch. D. 552.

Goren,[192] had held that where trustees under an erroneous view of the effect of a will had paid to persons money to which they were not entitled, the court in administering the estate would compel a restitution and repayment. This argues much for consistency in the Chancery practice.

VI. Error of Law is Not Without Remedy in England, Germany or France.

The irresistible conclusion arrived at after a careful examination of the cases is that on principle, and by a great weight of authority, *Bilbie* v. *Lumley*[193] and *Brisbane* v. *Dacres*,[194] do not represent the true doctrine in England and are not to be followed as the law there to-day. One may not be able to lay his hand on any particular case in which the reporter has expressly stated that it overrules the doctrine of Lord Ellenborough as approved by Sir Vicary Gibbs, for English jurists have a pride in their precedents which they do not care to lower by boldly setting them aside; it usually is more convenient to go around them, and that is what has been done here. Lord Ellenborough overturned a line of precedents running back two hundred years, but because he did not know the law. Sir Vicary Gibbs fell into the same error, not knowing that Lord Ellenborough had recanted his doctrine, largely because it was the practice in insurance transactions not to return money that had been paid with a knowledge of the facts.

The courts, however, have recognized the injustice of the false rule, and they have been getting away from it almost from the date of its utterance. Learned investigators,[195] who went deeply into the cases as far back as 1840 and 1849, were abundantly satisfied that the preponderance of authority favored relief, under proper circumstances, when error of law had been committed. Summarizing the decisions down to 1840, *The American Jurist* said:[196]

"We think it will be found that in most if not all of the cases, when we meet with the strongest language against granting relief, there was no sufficient evidence of any mistake having occurred or else there were other controlling circumstances, going of themselves to settle the case, so that even if those same courts had

[192] (1849) 11 Beav. 483. [193] (1802) 2 East 469.

[194] (1813) 5 Taunt. 143.

[195] XXIII Am. Jur. 422; Nisbit, J., in Culbreath *v.* Culbreath (1849) 7 Ga., 64.

[196] XXIII Amer. Jur. 422.

held mistakes of law to be remediable under proper circumstances, and if the pretended mistake had been proved in these cases, they would have decided them practically as they did decide them. * * * In regard to the decisions on the other side, some of them were put expressly upon the ground of mistake and many of the others, if we correctly apprehend them, were actually decided upon that ground, and without such mistake the decision must have been the other way. On the whole, in view of all the cases on the subject, of the language used in them, and the circumstances under which it was used, we cannot but regard the actual preponderance of authority as unequivocally in favor of the doctrine that mistakes of law may afford good cause for relief."

Modern English decisions materially strengthen this view, and add to the weight of authority in favor of relief, notwithstanding the *dicta* on both sides of the question and the contrary views of many text writers. And even the latter are almost unanimous in the view that this should be so, on principle.

The jurists of Germany and France are of one mind that between error of law and error of fact there should be no distinction and have accepted the rule of Vinnius,[197] adopted by both D'Aguesseau [198] and Huber,[199] that:

"The recovery should be allowed of that which is paid under an ignorance of law, provided there is not any natural obligation."

Lord Mansfield's rule [200] is but the same idea in another form:

"Where the money is paid under a mistake, which there was no ground to claim in conscience, the party may recover it back."

This is the true doctrine.[201]

Law being the rule of right, the perfection of reason, commanding what is useful and necessary, forbidding what is not, and requiring nothing impossible,[202] it is just and equitable that error of law should not be without a remedy, and the courts of England and the Continent are so administering it.

CORRY MONTAGUE STADDEN.

WASHINGTON, D. C.

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[197] Select Questions, Lib. 1, c. 41, p. 123. [198] Error de Droit 660.
[199] ad Inst. Lib. 3, tit. 28; and ad Dig. Lib. 12, tit. 6 and Lib. 22, tit. 6.
[200] Bize *v.* Dickason (1786) 1 T. R. 285.
[201] VI Albany Law Jour. 103. [202] Coke, Litt. 319, b; 231, b.